TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1279

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Petitioner Pacific Mutual Life Insurance Company has raised a host of substantive and procedural due process challenges to the punitive damages assessed against it in this case. To lend credence to its demands for unprecedented constitutional "reform" of punitive damages law, Pacific Mutual has described this as a case in which a runaway jury assessed massive punitive liability wholly disproportionate to the minimal actual harm suffered by respondents, and then imposed that liability on Pacific Mutual even though the fraud that injured respondents was perpetrated by the agent of a different insurance company.

The record tells a different story. The only respondent who received a sizable award, Cleopatra Haslip, suffered devastating financial and emotional harm. After incuring hospital bills equivalent to almost half her *annual*

take home pay, she discovered her insurance coverage did not exist because her premiums had been stolen by Pacific Mutual's agent, Lemmie Ruffin. She was completely unable to pay her bills. Her creditors obtained still-unsatisfied judgments against her, which ruined her previously solid credit rating—a matter of particularly grave concern to persons of limited means.[1]

As will be shown, the jury in this case specifically found, on the basis of ample evidence, that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents, and the Alabama Supreme Court affirmed that factual finding. The jury also heard ample evidence that Pacific Mutual stood idly by after receiving clear notice of earlier frauds by Ruffin, and of the specific likelihood he was defrauding respondents. Indeed, Pacific Mutual's Birmingham agency manager *and* Pacific Mutual's home office knowingly took actions essential to consummation of the fraud, even though those actions violated company policy and industry practice.

1. *Scope of Employment.* It is undisputed that Ruffin had actual authority to sell Pacific Mutual *life* insurance

[1] In January 1982, Haslip was hospitalized for a serious kidney infection. She expected Pacific Mutual to pay everything above the $100 deductible but discovered she had no coverage. Because she was depending on her insurance, she could not pay any of her bill. The hospital would not discharge her until she paid a portion of it, so her daughter was forced to come up with several hundred dollars to obtain Haslip's release. Even so, Haslip still owed the hospital more than $2,000, the urologist $300 and another physician $600. Not surprisingly she was unable to cope with those debts. She was successfully sued by the hospital and the urologist. The suits destroyed her credit. She sought to live without credit, and pay back these debts, since 1982. *See* Record Transcript ("RT") at 101-104, 173-179, 187-195.

Mrs. Haslip's injury was compounded by Ruffin's egregious conduct. While she was hospitalized, Haslip telephoned Ruffin to verify her insurance number. Ruffin—evidently realizing that his fraud was about to be discovered—argued with Haslip over the proper amount of the deductible, threatened to cancel her policy and thereafter sent a mailgram purporting to cancel her insurance. RT at 184-85, 196-200, 231-33.

policies to respondents, that Pacific Mutual derived some economic benefit from sales to respondents, and that Ruffin defrauded respondents by stealing most of their life insurance premiums. Thus Pacific Mutual cannot plausibly claim Ruffin was acting wholly as the agent of a different company—Union Fidelity—when he defrauded respondents. Nor is there merit to Pacific Mutual's claim that when Ruffin sold group *health* insurance to respondents he was acting as an agent not of Pacific Mutual, but of Union Fidelity. As the Alabama Supreme Court found, there "is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffin and his agency manager . . . were acting within the line and scope of their employment with Pacific Mutual when Ruffin made the representations to plaintiffs that became the subject of this suit." Pet. App. B 9.[2]

Ruffin gave respondents a single proposal for both life *and* health insurance, on Pacific Mutual letterhead using Pacific Mutual's home office address in California.[3] The words "Union Fidelity" were typed in much smaller characters in the body of the proposal beneath the Pacific Mutual logo, but there was no indication that Union Fidelity was an unaffiliated insurance company. The trial court's post-verdict order found that Ruffin told respondents their health insurance would be issued by Pacific Mutual directly, or by "a subsidiary of Pacific Mutual." Pet. App. A 2; *see also, id.* at A 4-5.[4]

[2] Ruffin admitted, for example, that throughout his dealings with respondents, he always represented himself "as an agent of Pacific Mutual Company." When asked, "at *any* time that you sold insurance, were you *ever* acting in a capacity other than as a representative of Pacific Mutual Insurance Company?," Ruffin answered "no." JA 71 (emphasis added). *See also* Ruffin, RT at 477, JA 73; Poindexter, RT at 96, 98-99; Haslip, RT at 170; Calhoun, RT at 302-303; Craig, RT at 330; Hargrove, RT at 278; PX 1.

[3] PX 2, JA 113; Ruffin, RT at 438; Haslip, RT at 171-172; Calhoun, RT at 306.

[4] *See* Craig, RT at 330, 332; Calhoun, RT at 304, 316-317; Haslip, RT at 206, 212, 244-246. The City Clerk testified she understood

Ruffin's packaging of Pacific Mutual life insurance and Union Fidelity health insurance was not at all unusual. Although Pacific Mutual's internal policies did not permit the sale of Pacific Mutual group health insurance to municipal employees, Pacific Mutual *encouraged* its agents to package Pacific Mutual life insurance with health insurance from other companies. This corporate strategy was designed to boost sales of Pacific Mutual life insurance by minimizing the loss of municipal customers who wanted *both* life and health coverage. RT 429, 431.

There were further reasons for respondents to believe Ruffin was acting as Pacific Mutual's agent. Ruffin was Pacific Mutual's "employee." Trial Court Order, Pet. App. A 2. He worked exclusively out of a Pacific Mutual branch office for which "the home office footed all the bills." Ruffin, RT at 415.[5] Each month Ruffin delivered a single invoice to the City of Roosevelt for both the life and health insurance premiums, and each invoice came from Ruffin's "office at Pacific Mutual . . . on Pacific Mutual letterhead." Ruffin, RT at 448. Those invoices did not mention Union Fidelity and did not indicate that there were two insurance companies, or even two insurance policies. Poindexter, RT at 126, 141. To the contrary, the City was billed a single amount for all respondents, for "the master policy." PX 7, JA 114.

Ruffin misappropriated most of those premiums. Although respondents' policies were cancelled for nonpayment after a month or two, they never received notices of cancellation, and therefore continued to pay monthly premiums to Ruffin. The trial court found that respond-

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that Union Fidelity "was a subsidiary of Pacific Mutual," because Ruffin told her that Union Fidelity "was just the hospital part of Pacific Mutual." Poindexter, RT at 99-100; *id.* at 117, 120.

[5] The branch office "was not a franchise type deal." Ruffin, RT at 416. The Manager, Mr. Lupia, was "an employee of the company," which paid "all the expenses." The Manager had "to operate within this budget." *Id.*

ents did not know their policies had been cancelled "because the cancellation notice[s] from *both* Union Fidelity *and Pacific Mutual* were sent to *Ruffin* who continued to collect premiums from Roosevelt City." Pet. App. A 2 (emphasis added).[6] An expert on the insurance industry testified that it "is not standard for the insurance industry" to send cancellation notices to the agent, rather than to the policy owner—because that facilitates precisely the type of fraud that ensued here. Giaser, JA 78.

In determining a punitive amount necessary to deter similar frauds in the future, the jury had ample basis to conclude that if Pacific Mutual had not mailed its cancellation notices to Ruffin, rather than to respondents, in violation of industry standards, the fraud against respondents *could not have occurred*; respondents would have known their insurance had been cancelled and would have withheld further premiums.[7]

2. *Notice.* Almost a year before the frauds at issue here, Pacific Mutual received explicit and repeated notice that Ruffin was engaged in a *pattern* of frauds *identical* to those Ruffin later perpetrated against respondents. Deborah Ault was the "personal secretary" for Patrick Lupia, the Manager of Pacific Mutual's Birmingham office. Ault, RT at 352, 350. She testified that "beginning in November of 1980," and continuing for approximately "eight or nine months," she received telephone

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[6] *Id.* at A 14: "Ruffin had the cancellation notices sent to him from California."

[7] Respondents would naturally have inquired why their life insurance had lapsed for non-payment, even though they had made all monthly payments on time. These inquiries would also have alerted them to the identical problem with their health insurance policies. Respondents all testified that they had received no cancellation notices from Pacific Mutual or Union Fidelity. Haslip, RT at 201; Craig, RT at 333, 330; Calhoun, RT at 308-310; Hargrove, RT at 281-282. *See also*, PX 14, JA 118; PX 16, JA 120; PX 17, JA 121; Ralph Passman, RT at 256, 268; see also *id.* at 271 and 393-395, JA 68-70.

calls "[t]wo or three times a week" complaining about Ruffin. JA 75. It was always the "same complaint." Ault, RT at 503. The callers told her "that they had purchased insurance with our company through Lemmie Ruffin," but "when they had submitted a claim . . . they were informed that they did not have insurance with us." JA 74. Ault invariably gave that information to Pacific Mutual's Birmingham manager, who repeatedly told her "that he would talk with Lemmie about it and they would take care of the problem." JA 75.

The trial court ruled that Ault's testimony could be considered by the jury "on questions of notice to the defendant Pacific Mutual Insurance Company." JA 74-75.[8] The Alabama Supreme Court also ruled that Ault's testimony was admissible "to prove *Pacific Mutual's* notice of the fraud," and found that "Ault's testimony showed that *Pacific Mutual* had received notice" of those complaints. Pet. App. B 11 (emphasis added).

Pacific Mutual also had notice, through its Birmingham manager, that Ruffin was *repeatedly* soliciting and receiving monthly premiums *payable to Ruffin*, on policies issued *by Pacific Mutual*. Ruffin, JA 71; PX 6. Ault testified that when Ruffin showed her premium checks made out to him, she informed the Manager that Ruffin was personally receiving premium checks in violation of company policy. JA 76-77. Ruffin continued to violate the policy even though Ault "went through the same process" of notifying the Manager "several" times. JA 77.[9] Thus,

[8] The trial court found that the Manager "had notice of past problems with Mr. Ruffin including, but not limited to, prior acts of fraud." Pet. App. A 14-15.

[9] Inexplicably, Pacific Mutual now argues that "[n]o evidence showed that [its Manager] was aware that Mr. Ruffin was collecting premiums contrary to his contract." Pet. Br. at 27; *id.* at 5. At trial, Pacific Mutual's lawyer *conceded* Ault gave that information to the Manager, and simply tried to establish that the Manager had told Ruffin not to do that any more. JA 77.

Pacific Mutual also had notice that Ruffin was repeatedly violating Pacific Mutual's stated policy in the very way Ruffin would later use to defraud respondents. Without that violation, the frauds against respondents could not have occurred.

Indeed, as the Alabama Supreme Court found, "Pacific Mutual's *home office* had received complaints regarding Ruffin's fraudulent activities *but had done nothing about them.*" Pet. App. B 9 (emphasis added). Instead, Pacific Mutual *itself* initiated contact with respondents to solicit their business, *and specifically directed respondents to contact Ruffin.*[10] Given these facts, the jury had ample reason to conclude that Pacific Mutual was indifferent to fraudulent activities by its agents, and that a substantial punitive award would be necessary to change that conduct.

3. *Alabama's Procedures.* The jury in this case was instructed—as juries across the Nation have been instructed for 200 years—that it could impose punitive damages to "punish the defendant" and to protect "the public by deterring the defendant and others from doing such wrong in the future." JA 105-106. The jury was further instructed that it should "take into consideration the character and the degree of the wrong," but that its evaluation had to be constrained by what was "shown by the evidence." JA 106. Pacific Mutual raised no contemporaneous objection to any alleged lack of specificity in this instruction, and did not propose a more particularized charge. *See* note 35 *infra*. The jury was also instructed that Pacific Mutual could be liable for punitive as well as compensatory damages only if Ruffin was acting within the scope of his employment for Pacific Mutual when he defrauded respondents. JA 101-107. No evidence of Pacific Mutual's financial position was provided to the jury.

[10] RT at 78-79, 821-822. *See also*, Ruffin, RT at 414, 431-433.

The trial judge subjected the jury's punitive damages verdict to exacting post-verdict scrutiny. In conformity with the substantive and procedural requirements of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the court conducted a hearing at which Pacific Mutual was free to present evidence and make arguments demonstrating the excessiveness of the punitive award. After the hearing, the trial judge entered a written statement finding the punitive award to be within a reasonable range in light of the evidence and the substantive criteria set forth in *Hammond* for evaluating potential excessiveness. The Alabama Supreme Court likewise subjected the verdict to substantive scrutiny, and affirmed.

SUMMARY OF ARGUMENT

Pacific Mutual urges this Court to "reform" punitive damages by (i) creating substantive due process law to supplant state rules that determine when a corporation can be held liable for the acts of its employees; (ii) discarding the standards and procedures devised by the Alabama Supreme Court for guiding and confining the discretion of juries setting punitive awards; and (iii) imposing an inflexible substantive due process ceiling on the size of punitive awards. These claims should be rejected.

First, Alabama's law of vicarious liability for punitive damages has a rational basis, and thus—like all regulation that does not burden a fundamental right—must be affirmed, as the Court long ago expressly ruled in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). Indeed, Alabama's common law of vicarious liability is virtually identical to the vicarious liability principles incorporated by judicial interpretation into the Sherman Act. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). (Point I).

Second, Alabama's procedures for assessing punitive damages incorporate traditional common law jury instructions that have never been found unfair or unconstitutional in their 200 year history. In fact, Alabama's procedures offer greater protection than the traditional common law. The jury's award is subjected to exacting post-verdict and appellate scrutiny pursuant to clearly defined substantive standards. Individually and together, Alabama's trial and appellate procedures provided Pacific Mutual with all the process it was due. (Point II).

Third,—as the Alabama courts held—the punitive award against Pacific Mutual was reasonably related to the State's goal of deterring fraud. Accordingly, the award is consistent with any conceivable due process requirement that punitive awards not be grossly excessive. Pacific Mutual's demand for stricter substantive scrutiny of the size of punitive awards would require an inappropriate federalization of state tort law, and is foreclosed by the principles articulated in this Court's recent ruling in *Browning-Ferris Industries, Inc. v. Kelco Disposal Co.*, 109 S. Ct. 2909 (1989) (Point III).[11]

Adoption of Pacific Mutual's arguments would require this Court to remake its due process jurisprudence in a way that is fundamentally inconsistent with principles of federalism and judicial restraint. Indeed, proceeding from the demonstrably false premise that there has been an "explosion" in the size and frequency of punitive awards,[12] Pacific Mutual is asking this Court, in effect, to legislate an overhaul of state punitive damages law. The Due Process Clause does not justify this radical undertaking.

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[11] Pacific Mutual's remaining arguments likewise have no merit. (Point IV).

[12] *See* pp. 23-25 *infra*.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT PROHIBIT VICARIOUS LIABILITY FOR PUNITIVE DAMAGES RESULTING FROM THE FRAUDULENT CONDUCT OF AN AGENT ACTING WITH APPARENT AUTHORITY AND WITHIN THE SCOPE OF HIS EMPLOYMENT.

Pacific Mutual's due process challenge to vicarious liability for punitive damages is based on two arguments: that Ruffin was not acting as its agent when he defrauded respondents;[13] and that a corporation cannot be held liable for punitive damages for the conduct of its agent unless the corporation was independently at fault or benefitted from the conduct.[14] The first argument ignores the factual record. The second ignores settled principles of constitutional law.

A. The Record Forecloses Any Claim That Ruffin Was Not Acting As Pacific Mutual's Agent When He Committed The Frauds At Issue.

The jury was repeatedly instructed that Pacific Mutual could be held liable for punitive damages *only* if Ruffin was acting within the scope of his employment *with Pacific Mutual* when he defrauded respondents. RT 892-900, JA 101-107. The verdict is thus necessarily based on a factual finding that Ruffin was acting as *Pacific Mutual's* agent when he committed those frauds. The trial court and the Alabama Supreme Court *both* found ample evidence to support that finding.[15] These factual findings are not open to dispute here. *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Accordingly, Pacific Mutual is foreclosed from arguing that Ruffin was not acting as its agent when he defrauded respondents.

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[13] *See* Pet. Br. at 3, 27; Cert. Pet. at 3, 9, 16.

[14] Pet. Br. at 10; *see also id.* at 31.

[15] Pet. App. A 9; Pet. App. B 9-10 (summarizing that evidence).

B. Alabama's Rule Of Corporate Vicarious Liability Fully Comports With Due Process.

Pacific Mutual's repeated invocation of "fundamental fairness" should not mask the nature of its objection to vicarious liability. Pacific Mutual claims that *substantive* due process supplants Alabama's common law rule that corporations are liable for both compensatory and punitive damages resulting from *all* fraudulent acts of agents and employees within the scope of their employment. Under the Due Process Clause, however, Alabama's vicarious liability rule—like all state economic and public welfare regulation that does not burden a fundamental right—must be upheld if this Court can discern a rational basis for it. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Alabama's rule—which is also the rule in many other States[16]—rationally advances the State's interest in minimizing fraud. Alabama has long applied this rule in the insurance context because the State has a strong interest in deterring fraud by agents and has determined that insurance companies would be more likely to prevent frauds by their agents if given sufficient financial incentive to do so.[17] By imposing exemplary damages on a corporation

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[16] *See Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Piedmont Cotton Mills, Inc. v. General Warehouse No. 2*, 222 Ga. 164, 149 S.E.2d 72 (1966); *Kiser v. Neumann Co. Contractors, Inc.*, 426 S.W.2d 935 (Ky. 1967); *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202 (1869); *Hairston v. Atlantic Greyhound Corp.*, 220 N.C. 642, 18 S.E.2d 166 (1942); *Kurn v. Radencic*, 193 Okla. 126, 141 P.2d 580 (1943); *Stroud v. Denny's Restaurant, Inc.*, 271 Or. 430, 532 P.2d 790 (1975); *Chuy v. Philadelphia Eagles*, 595 F.2d 1265 (3rd Cir. 1979) (applying Pennsylvania law); *Hopper v. Hutto*, 160 S.C. 404, 158 S.E. 726 (1931); *Odom v. Gray*, 508 S.W.2d 526 (Tenn. 1974).

[17] See *British General Insurance Co. v. Simpson Sales Co.*, 93 So. 2d 763, 768 (Ala. 1957). This common law rule supplements a *legislative* determination that insurance companies should be held responsible for the wrongful acts of their agents when, as in this case, the company has applied for a license for the agent and has

when its agents or employees commit intentional fraud, the rule creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." [18]

Encouraging such vigilance is particularly appropriate in the insurance context. Insurance is essential to the personal security and financial planning of most Americans.[19] Fraud by an insurance agent depends for its success on the agent's status and credibility as a representative of the insurance company. Victims entrust insurance agents with their money—and thus their personal and financial security—precisely because they believe an agent is backed by the good name and financial resources of the insurance company the agent represents.[20] For these reasons, Alabama—and every other State—imposes special obligations on insurance companies to ensure agents are trustworthy.[21] Vicarious imposition of punitive liability for insurance fraud works in tandem with these regulations to encourage effective corporate oversight.

If corporations were liable for exemplary damages only upon proof that they were independently at fault, they

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certified that the agent is worthy of public trust. *See Cincinnati Ins. Co. v. City Of Talladega*, 342 So. 2d 331, 337 (Ala. 1977). *See also* n.21 *infra*.

[18] *Pizitz*, 274 U.S. at 116 (upholding Alabama's rule of vicarious liability).

[19] Ruffin's fraud created a serious risk that respondents would die without the life insurance coverage that would have been the mainstay of their families' financial security, and also risked devastating consequences in case of serious illness, as befell respondent Haslip.

[20] Restatement 2d of Agency § 261 comment a, at p. 571.

[21] For example, Alabama requires insurance companies to investigate the "character and background" of their agents and to certify that they are "trustworthy." Ala. Ins. Code § 27-8-5 (Michie ed. 1989 Supp.).

would have strong incentive to *minimize* oversight of their agents; the less they knew about their agents' conduct, the less likely they would be found at fault for failing to prevent a fraud. Furthermore, fraud victims often have great difficulty pinpointing corporate fault, and still more difficulty proving it.[22] Because imposing vicarious liability without fault deters more fraud than would a less stringent rule, it rationally advances Alabama's goals.

Indeed, Alabama's policy choice is identical to that embodied in the federal antitrust laws. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982). In *Hydrolevel*, this Court adopted a rule of vicarious liability for treble damages under the antitrust laws that seeks to achieve deterrence in a way indistinguishable from the Alabama rule at issue here. The Court held that a principal is liable for treble damages for antitrust violations by agents acting with apparent authority, even if the principal was without fault and did not benefit. If the principal is civilly liable for violations by its agents acting with apparent authority, "[p]ressure will be brought on [the organization] to see to it that [its] agents abide by the law." *Id.* at 572 (quoting *United States v. A&P Trucking Co.*, 358 U.S. 121, 126 (1958)).

Hydrolevel expressly rejected, in the antitrust context, the substantive limitations Pacific Mutual argues are required by the Due Process Clause. Requiring fault, the Court held, would permit the principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct, and . . . would therefore encourage [it] to do as

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[22] *Cf. United States v. Balint*, 258 U.S. 250, 254 (1922) ("considerations as to the opportunity . . . to find out the fact [essential to liability] and the difficulty of proof" support imposing liability without fault); *Sherlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69 (1910) (imposing liability for civil fine without fault appropriate where "offenders were difficult to detect, or, if detected, the character of their acts . . . equally difficult to establish" in court).

little as possible to oversee its agents." *Id.* at 573.[23] The *Hydrolevel* Court also rejected any benefit requirement; whether the principal benefitted from the conduct "is simply irrelevant" to the law's purposes. "[A]gents can have the same anticompetitive effects on the marketplace," when "act[ing] solely to benefit themselves." *Id.* at 574.[24] Whether or not one agrees with the *Hydrolevel* majority that vicarious liability without fault or benefit is the best rule, *Hydrolevel* makes clear that it is rational. Due Process requires no more.

Even in the "fortunately long gone" era of strict substantive due process scrutiny of state economic regulation,[25] a unanimous Court in *Pizitz* rejected a due process challenge indistinguishable from the one raised here. At issue was the constitutionality of Alabama's wrongful death statute, which imposed punitive damages on employers for the conduct of employees. A corporate employer had been found liable for punitive damages as a

[23] In a *Hydrolevel amicus* brief, the United States supported vicarious liability without fault for precisely this reason. Otherwise, the United States explained, principals "would have a strong incentive to *minimize* their supervision and investigation of potentially anticompetitive practices. To the extent the organization succeeded in looking the other way, it would be free from liability and could rely with confidence on the defense that the acts of its agents were 'undertaken without the knowledge or consent of the organization.'" Brief For The United States As Amicus Curiae, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, No. 80-1765 (filed October 22, 1981), at 26.

[24] Furthermore, Pacific Mutual's "benefit" argument is not properly before the Court, because Pacific Mutual did not request an instruction that it could be found liable for punitive damages only if it benefitted from the fraud. Nor did it advance a "benefit" argument in its motion for directed verdict, motion for judgment NOV, or for new trial, in the Alabama Supreme Court, or even in its petition for certiorari in this Court.

[25] *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985).

result of its employee's negligence, but no evidence suggested fault on the part of the employer. Relying on *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), the employer argued that the Alabama statute was "violative of the fundamental conceptions of fair play, and contrary to natural justice and therefore repugnant to the 14th Amendment," because the "relationship of master and servant affords no basis for punishing vicariously the innocent master."[26]

Rejecting that argument, the Court found that the goal of the Alabama statute was "to strike at the evil . . . by imposing liability, *regardless of fault*, upon those who are in some substantial measure in a position to prevent it." 274 U.S. at 116 (emphasis added).[27] As the *Pizitz* Court held:

> The principle of respondeat superior itself and the rule of liability of corporations for the willful torts of their employees, extended in some jurisdictions . . . to liability for punitive damages, . . . are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law.

Id. at 115 (citations omitted). Thus, in *Pizitz*, as in *Hydrolevel* 55 years later, the Court recognized the deterrent purposes served by vicarious imposition of puni-

[26] *See* Brief on Behalf of Plaintiff in Error, *Louis Pizitz Dry Goods Co. v. Yeldell*, No. 171 (filed Jan. 27, 1927) at 6, 24. See *id.* at 20-21 (quoting at length from *Lochner* and *Adkins*).

[27] Here, Pacific Mutual could easily have prevented Ruffin's frauds. For example, Pacific Mutual's *home office* could simply have followed industry standards and refused to divert cancellation notices from respondents to Ruffin. *That act alone would have prevented the frauds at issue.* Or it could have acted on notice of Ruffin's pattern of fraudulent conduct and dismissed or at least closely monitored him.

tive damages for the acts of agents and employees taken within the scope of their employment.[28]

Indeed, this Court's decisions in a broad range of civil and even criminal contexts make clear that imposing liability without fault is not fundamentally unfair and does not violate the Due Process Clause. *See Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910); *United States v. Park*, 421 U.S. 658, 670 (1975); *United States v. Balint*, 258 U.S. 250, 252 (1922); *see also United States v. Freed*, 401 U.S. 601, 607 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284 (1948). These decisions uniformly recognize the sound policy reasons supporting imposition of liability without fault, especially where fault would be difficult to detect and prove. *Balint*, 258 U.S. at 254; *Shevlin-Carpenter*, 218 U.S. at 69.

Acceptance of Pacific Mutual's argument would invalidate a multitude of state and federal laws. The common law of vicarious liability in force in many States, the criminal statutes at issue in *Balint*, *Freed*, *Park* and *Dotterweich*, and numerous other state and federal laws imposing liability without fault would be nullified. The theory of Sherman Act vicarious liability adopted in *Hydrolevel* could not survive, nor could several crucial federal statutes regulating financial markets.[29]

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[28] Pacific Mutual, and several *amici*, have tried to distinguish *Pizitz* on the spurious ground that the statute at issue did not impose punitive liability, but compensatory relief. The sole shred of support for this contention is a phrase in the opinion indicating that the statute's purpose is "remedial." 274 U.S. at 114. As the surrounding passage in the opinion makes clear, however, when the Court described the statute as "remedial," it meant that the statute was aimed at *deterring* "death by wrongful act or omission," and thus, like all exemplary damages, had deterrent objectives.

[29] For example, Section 4a of the Commodities Exchange Act expressly holds corporate principals liable for violations by their employees and agents, with no requirement of fault or benefit on the part of the corporation. 7 U.S.C. § 4a. *See Stotler and Co. v. C.F.T.C.*, 855 F.2d 1288, 1291 (7th Cir. 1988) (upholding vicarious liability for civil fine; "it does not matter if the principal participated in, or even knew about the agent's acts").

Alabama has made a rational choice among competing policy considerations. That other accommodations of these competing interests might also be rational—or even preferred by individual judges—is not material to this Court's constitutional analysis. If the People of Alabama or other States decide they prefer the substantive rule Pacific Mutual urges, "[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular law-making process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998, 1007 (1989).[30]

II. THE PUNITIVE DAMAGE AWARD WAS THE PRODUCT OF FAIR, RATIONAL AND RELIABLE PROCEDURES THAT SATISFY ALL REQUIREMENTS OF DUE PROCESS.

Alabama provided Pacific Mutual with all the traditional protections that afford due process in civil proceedings. It is undisputed that Alabama's exercise of jurisdiction comported with "traditional notions of fair

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[30] In every other respect, the imposition of vicarious liability on Pacific Mutual was consistent with the due process requirement of fundamental fairness. Alabama case law provided clear notice, long before the frauds at issue, that Pacific Mutual could be held vicariously liable for substantial punitive damages for the intentionally fraudulent acts of its agents acting within the line and scope of their duty, even if Pacific Mutual was not at fault and did not benefit. *See National States Insurance Co. v. Jones*, 393 So. 2d 1361, 1367, 1368 (Ala. 1980), quoting from *Old Southern Life Insurance Co. v. McConnell*, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974).

play and substantial justice," [31] and that Pacific Mutual was afforded notice,[32] a meaningful pre-deprivation opportunity to be heard,[33] and a neutral decisionmaker.[34]

Pacific Mutual, however, seeks more. Without suggesting what *would* satisfy its expanded vision of Due Process, Pacific Mutual contends that Alabama's standards for assessing punitive damages are inadequate.[35] Because Alabama superimposes comprehensive standards that trial and appellate courts apply when reviewing punitive awards, Pacific Mutual is forced to argue that even post-trial and appellate application of detailed standards does not suffice. Pet. Br. at 40-41.

Pacific Mutual's argument for unprecedented due process restrictions on traditional state procedures cannot be

[31] *See Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990) (quotation omitted).

[32] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

[33] *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

[34] *See Tumey v. Ohio*, 273 U.S. 510 (1927).

[35] Pacific Mutual now objects to the standards the jury employed to assess punitive damages. Yet, Pacific Mutual raised no contemporaneous objection to the *standards* comprised in the trial court's instruction. RT at 910-17. In fact, even on the issue of entitlement to punitive damages, Pacific Mutual merely requested the following general instruction:

> Before you can award the plaintiffs any punitive damages in this case, you must be reasonably satisfied from the evidence that the conduct of the defendant was such conduct as deserves the imposition of punishment.

Requested Instruction To The Jury By Defendant Pacific Mutual Life Insurance Company, at ¶ 27. Pacific Mutual's requested instruction is less specific than that given by the trial court. In the absence of a specific objection to the trial court's instructions, Pacific Mutual should not now be heard to object to the lack of standards. It gave the trial court no opportunity to consider whether more specific standards might be appropriate. *Cf. Osborne v. Ohio*, 110 S. Ct. 1691, 1703 (1990).

squared with this Court's repeated admonitions that the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities," *Walters*, 473 U.S. at 326, and that "[t]here is no requirement as to exactly what procedures to employ whenever a traditional judicial-type hearing is mandated." *Parham v. J.R.*, 442 U.S. 584, 608 n.16 (1979).

A. Traditional Common Law Standards And Procedures For Assessing Punitive Damages Are Fully Consistent With The Due Process Clause.

Punitive damages "have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).[36] Under the traditional common law approach—which governs punitive awards in most States [37] —the amount of a punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure it is reasonable.

This Court has repeatedly approved that common law method for assessing punitive awards. In 1851, the Court approved the "well-established principle of the common law" that:

> [i]n many civil actions, . . . the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. . . *This has been*

[36] The first reported American case in which punitive damages were available is *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791).

[37] *See* Brief *Amicus Curiae* of Nat'l Assoc. of Wholesaler-Distributors, *et al.*, at Appendix. Congress has provided for punitive damages in many instances. *See, e.g.*, 11 U.S.C. § 303(i)(2)(B); 11 U.S.C. § 362(h); 11 U.S.C. § 363(n); 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 298(c); 15 U.S.C. § 1116(d)(11); 15 U.S.C. § 1681n(2); 26 U.S.C. § 7431(c)(1)(B)(ii); 33 U.S.C. § 1514(c).

always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.

Day v. Woodworth, 13 How. 363, 371 (1851) (emphasis added). The Court has confirmed its approval several times. In *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885), for example, the Court observed that "[t]he discretion of the jury in [cases permitting punitive damages] is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice."[38] More recently, in *Smith v. Wade*, this Court affirmed the assessment of punitive damages pursuant to 42 U.S.C. § 1983, in a case in which the trial court used the common law method for determining the amount of the award. 461 U.S. 30 (1983). Indeed, the jury charge in *Smith*, which was drawn from standard state punitive damages instructions, was less detailed than the charge at issue here.[39]

In view of this history, Pacific Mutual cannot plausibly claim that the common law method for assessing punitive

[38] In *Barry v. Edmunds*, referring to both compensatory and punitive damages, the Court observed that "nothing is better settled than that in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." 116 U.S. 550, 565 (1886). *See also Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 36 (1889) ("propriety and legality" of common law method of assessing punitive damages "have been recognized . . . by repeated judicial decisions for more than a century [and] cannot, therefore, be justly assailed as infringing upon the fourteenth amendment of the constitution of the United States"). The principle was so well-established by 1927 that in *Pizitz*, although the parties briefed this issue in detail, the Court unanimously upheld the punitive award there without even bothering to discuss the claim. *See* n.42 *infra*.

[39] The instruction read: "The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct." 461 U.S. at 33.

damages is so fundamentally unfair as to deny due process. As this Court has repeatedly made clear, "[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Sun Oil Co. v. Wortman*, 108 S. Ct. 2117, 2126 (1988) (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.)).[40] This Court gives great weight to history when deciding whether particular civil adjudicatory procedures provide due process.[41] *See, e.g., Burnham v. Superior Court of California*, 110 S. Ct. 2105 (1990); *Sun Oil Co. v. Wortman*, 108 S. Ct. at 2126 (1988); *see also Ownby v. Morgan*, 256 U.S. 94, 110-112 (1926); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-277 (1855). These decisions reflect the common-sense view that long-standing reliance on a particular procedure is powerful evidence that the procedure can be trusted to generate fair results.

Furthermore, as *Day v. Woodworth* makes clear, the common law method for assessing punitive damages was "well-established" before the Fourteenth Amendment was enacted—the "crucial time" for purposes of analyzing Pacific Mutual's due process claim. *See Burnham*, 110 S. Ct. at 2111. Nothing in the Amendment's text or history indicates even a remote intention on the part of its framers to overturn the prevailing common law method, or to secure a right in punitive damage cases to additional, unspecified standards beyond what courts had always used.

[40] *See also Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 111-116 (1934) (two hundred year history of challenged practice is crucial to a procedural due process analysis because "[t]he Fourteenth Amendment has not displaced the procedure of the ages").

[41] For three Members of this Court, the long pedigree of a common law method is conclusive of its constitutionality. *See Burnham v. Superior Court of California*, 110 S. Ct. 2105 (opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy, J.).

Thus it is not surprising that Pacific Mutual's procedural due process claim has been rejected by every court to have addressed it. In *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912), this Court explicitly rejected a challenge indistinguishable from the one Pacific Mutual now raises. Upholding a civil fine, the Court turned aside a due process claim that there was "any invalidity in the judgment because there was no statute fixing a maximum penalty [and] no rule for measuring damages." *Id.* at 285.[42] Every state and federal court to have considered the question has likewise ruled that the common law method for assessing punitive damages satisfies due process.[43]

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[42] *See also Pizitz*, 274 U.S. at 112 (upholding Alabama statute authorizing punitive damages for wrongful death against claim that it denied due process because the jury may "fix the penalty according to its unbridled discretion, without any method of ascertainment, and without any limit to the amount it may impose by way of punishment or penalty upon the defendant." Brief for Plaintiff in Error in No. 171, at 6).

[43] In *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701 (N.D. Ind. 1988), the court emphasized that "since the earliest of times, Indiana has recognized the need to have juries exercise the discretion which defendant now criticizes," citing to *Taber v. Hutson*, 5 Ind. 322 (1854). *Cf. FDIC v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) (standards governing the jury's assessment of punitive damages are purposefully flexible to permit the jury to achieve community consensus), *aff'd in relevant part*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1524 (1990). Several courts have noted the complete lack of precedent supporting a due process challenge to common law assessment of punitive damages. *See Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 (N.D. Ill. 1990); *McCutchen v. Liberty Mutual Ins. Co., supra.*

Several cases have upheld the constitutionality of common law standards no more specific than those in this case. *See Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989) (degree of wrongdoing and amount required to punish); *F.D.I.C. v. W.R. Grace & Co.*, 691 F. Supp. 87 (1988) (amount sufficient to punish and deter); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989) (reasonable sum to set an example and punish); *Puppe v. A.C. and S.*,

At bottom, Pacific Mutual urges this Court to condemn a procedure that has produced fair results for 200 years, because changed circumstances have allegedly generated an "explosion of punitive damages claims." Cert. Pet. at 11. Whether or not a perceived change in social conditions would ever justify reassessing the scope of procedural due process in the civil context,[44] this Court should not do so here.

First, contrary to the claims of Pacific Mutual and certain *amici*, the system is not in crisis. A very recent empirical analysis by the American Bar Foundation found *no* substantial increase in either the frequency or the amount of punitive awards. S. Daniels & J. Martin, *Myth and Reality in Punitive Damages*, 34, 41-45 (ABF Working Paper #8911). Based on a careful nationwide survey of tens of thousands of verdicts, the study found that: the principal empirical claims made by Pacific Mutual and its *amici* are "distorted"; "the general pattern is one of low to modest awards"; and "punitive damages were awarded infrequently." *Id.* at 34, 41-45. The study warned that any judicial and legislative "reforms" of punitive damages systems "are likely to be . . . based on an unfounded (and perhaps manufactured) notion of a crisis." *Id.* at 62-64.[45]

Inc., 733 F. Supp. 1355 (D.N.D. 1990) (amount needed to deter); *Potomac Electric Power Co. v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989) (amount sufficient to punish and deter). Other cases involved common law standards comparable to those governing the trial court's review of the award in this case. *See Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355 (5th Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989); *Horowitz v. Schneider National, Inc.*, 708 F. Supp. 1573 (D. Wyo. 1989); *Guy v. Commonwealth Life Ins. Co.*, 698 F. Supp. 1305 (N.D. Miss. 1988), *aff'd in relevant part*, 894 F.2d 1407 (5th Cir. 1990).

[44] *Compare Burnham v. Superior Court of California*, 110 S. Ct. 2105 (plurality opinion), *with id.* at 2120 (Brennan, J., concurring in the judgment).

[45] This study will be published in the October 1990 issue of the Minnesota Law Review (copies have been lodged with the Clerk

In 1989, the United States General Accounting Office published a study likewise concluding that punitive awards correlated strongly with the size of compensatory awards, and that appellate review provided a substantial, well-functioning safeguard against excessiveness. *See* Products Liability: Verdict and Case Resolution in Five States (GAO/HRD-88-99, Sept. 1989) at 29, 31-32, 41, 69. A special committee of the American Bar Association also recently found "no clear evidence of a present or impending crisis in punitive damages." *Punitive Damages: A Constructive Examination*, at 1-2 (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) (Nov. 1986).

Second, even if punitive awards had increased in frequency or size, it would not follow that current awards are unfair or arbitrary. This Court could not legitimately conclude that current methods for assessing punitive awards are generating unfair results without reviewing the evidence supporting the allegedly excessive awards, and then making a substantive judgment that those awards are irrational. *See* Point III *infra*. Such a review is not within the proper role of this Court.

Third, the governmental bodies *best* equipped to undertake such review—Congress, state legislatures and the state supreme courts that review punitive awards on their merits—are scrutinizing the procedures and experimenting with a variety of new approaches. No one could seriously contend that the opponents of punitive damages, represented in this Court through a handsome array of politically influential *amici*, are without adequate influ-

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of this Court). The principal authority cited to support Pacific Mutual's claim is the RAND study. That study does not, however, provide substantial support for the factual assertions of Pacific Mutual and its *amici*, as the recent ABF study makes clear. *See Myth and Reality in Punitive Damages*, at 31-64. *See also Brief Amicus Curiae* of Trial Lawyers for Public Justice; *Brief Amicus Curiae* of the Consumer Federation of America, at 7-10.

ence in those fora. If a two-hundred-year old judicial procedure is injuring the economy or yielding unfair results, there is no reason to suppose a remedy will not be fashioned in Congress or in state legislatures and state courts.

B. Alabama's Common Law Method For Assessing Punitive Damages Substantially Guides The Discretion Of The Jury, And Subjects The Jury's Assessment To Meaningful Review To Ensure Reasonable Punitive Awards.

Alabama juries are instructed in conformity with the traditional common law method for assessing punitive damages. Standing alone, those jury instructions satisfy the Fourteenth Amendment. But Alabama has gone much further in cabining the jury's discretion to set a punitive award. The post-trial and appellate review afforded defendants in Alabama provides additional assurance of the fairness of Alabama's procedures.

1. *The Jury Instruction.* The jury was instructed that the purpose of punitive damages is "not to compensate the plaintiff" but to "punish the defendant" and to protect "the public by deterring the defendant and others from doing such wrong in the future." JA at 105-106. The jury was *not* instructed, as Pacific Mutual suggests, to "punish selectively and arbitrarily and to give free reign to bias, prejudice and wealth redistribution inclinations." Pet. Br. at 10, 17. Indeed, all evidence of Pacific Mutual's wealth was excluded from the trial.[46]

Although the punitive damages instruction at issue left the jury with discretion to consider a range of relevant evidence, the jury's discretion was far from untethered. The instructions anchored the jury's deliberations in the state policies sought to be advanced by punitive damages —deterrence and retribution. Furthermore, the jury was

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[46] *See Southern Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978).

instructed that "in fixing the amount you *must* take into consideration the character and the degree of the wrong *as shown by the evidence.*" JA 106 (emphasis added).

These instructions reasonably accommodated Pacific Mutual's interest in fair, rational decisionmaking and Alabama's interest in meaningful, individualized assessment of appropriate deterrence and retribution. Alabama's approach reflects the historical consensus that no mechanical formula can adequately encompass the variety of case-specific facts that should inform the jury's individualized determination of a punitive award. An amount appropriate for deterrence and retribution in any case will depend on the gravity of the harm inflicted or risked, the potential gain to the defendant from exposing others to that harm, the difficulty of detecting and proving the harmful conduct, remedial measures taken or disdained by the defendant, and numerous other variables. Indeed, reducing the judgment to a mechanical formula may well result in the exclusion of relevant variables, and thus impede the jury's function.

Flexibility advances Alabama's interest in another important way. As several courts have recognized,

> it is the relatively indeterminate nature of punitive damages which makes them a valuable tool . . . because the indeterminacy . . . prevents [potential wrongdoers] from being able to predict, within certain limits, how much punitive damages will be awarded and figure such a number into a cost/benefit analysis. Rather than cure a defect, a [potential wrongdoer] might accept the risk of paying a limited punitive award.

Germanio v. Goodyear Tire & Rubber Co., 732 F. Supp. 1297, 1302-03 (D.N.J. 1990); *accord Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461, 1467 n.7 (D. Haw. 1989); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. S. Ct. 1984) (*en banc*).

Flexibility is a common and uncontroversial feature of much decisionmaking in our legal system.[47] Indeed, this Court has repeatedly upheld adjudicatory schemes affording substantial flexibility. For example, in *Schall v. Martin*, 467 U.S. 253 (1984), the Court rejected a due process challenge to New York's standards for detaining accused juvenile delinquents pending trial. Detention was to be imposed if a "serious risk" existed that an accused would commit a crime prior to his or her next court appearance. *Id.* at 278. The detention scheme was challenged on the ground that the "serious risk" standard "fails to channel . . . discretion . . . by specifying the factors on which [the decisionmaker] should rely," and thus results in "intrinsically arbitrary and uncontrolled" decisionmaking. *Id.*

This Court held that because the State's procedures guaranteed notice, an opportunity to be heard, a statement of reasons for the decision, and meaningful appellate review, the Due Process Clause did not require that "the specific factors upon which the . . . judge might rely . . . be specified in the statute." *Id.* at 279. As the Court made clear, if a State has an interest in individualized decisionmaking that takes into consideration "a host of variables which cannot be readily codified," *id.* (quotation omitted), Due Process does not require adjudication controlled by inflexible prescribed criteria. *Accord Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979).

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[47] The discretion exercised under Alabama law in deciding upon punitive damages is no greater than that involved in many substantive areas of the law—such as deciding "the best interests of the child," whether "reasonable care" has been exercised, or whether a fiduciary has exercised "due diligence." Nor is the discretion involved here any greater than that afforded juries deciding how much compensation is appropriate for pain and suffering or mental anguish. Many of the decisions our legal system requires cannot be reduced meaningfully to prescription. It does not follow, however, that decisions made in the absence of precise legislative formulations are arbitrary or unfair. So long as discretion is exercised within reasonable constraints, Due Process is satisfied.

Similarly, in *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a procedural due process challenge virtually indistinguishable from the one Pacific Mutual now advances. At issue in *McGautha* was the constitutionality of affording juries in capital cases "absolute discretion" to decide whether the death sentence should be imposed. *Id.* at 185.[48] The defendant argued that the absence of specific legislative standards to guide the jurors' exercise of sentencing discretion rendered their decision intrinsically arbitrary. The Court, however, found "it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases" amounted to a denial of Due Process. *Id.* at 207.[49]

Schall and *McGautha* involved constitutional interests of the highest order. The Fourteenth Amendment cannot require more process for punitive damage judgments than for judgments about liberty, or life itself.

2. *Post-Verdict Review In The Trial Court.* Even if the jury instruction standing alone left some doubt whether Pacific Mutual was denied due process—and it

[48] The jury was instructed that it was "entirely free to act according to your own judgment, conscience and absolute discretion" and that "the law itself provides no standard for the guidance of the jury in the selection of the penalty." 402 U.S. at 189-190 (quoting jury instruction).

[49] Of course, the Court subsequently held in *Furman v. Georgia*, 408 U.S. 238 (1972), that the Cruel and Unusual Punishments Clause of the Eighth Amendment did require greater specificity in standards guiding sentencing in capital cases. That ruling does not, however, undermine the force of *McGautha* in the present context. First, *Furman* was premised on the exceptional need for accuracy and fairness "on a matter so grave as the determination whether a human life should be taken." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion). Second, *Furman* reflects the Eighth Amendment's special concern with preventing *unusual* punishment. *See Walton v. Arizona*, 1990 U.S. Lexis No. 3462 (1990) (Scalia, J., concurring in the judgment).

does not—this Court has repeatedly made clear that jury instructions must be evaluated in the context of the entire process afforded a defendant:

> [I]t must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment. . . . [T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected *the entire trial* that the resulting conviction violates due process.

Cupp v. Naughton, 414 U.S. 141, 146-147 (1973) (emphasis added); *see also Donnelly v. DiChristoforo*, 416 U.S. 637, 642 (1974).[50] Accordingly, Pacific Mutual's procedural due process argument must be considered in light of the *entire* process Alabama uses in imposing punitive damages.

By the time of the trial, the Alabama Supreme Court had established additional post-trial procedures for scrutinizing punitive awards. In *Hammond*, the Supreme Court required trial courts to hold post-verdict hearings to examine awards of exemplary damages. To ensure reasoned decisionmaking and meaningful appellate review, *Hammond* required trial courts to provide written

[50] *See also Santosky v. Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, J., dissenting) (emphasis in original):

> [I]t is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. . . . Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."

explanations when affirming or reducing such awards. *Id.* at 1379. *Hammond* also set forth the following specific substantive standards to guide post-verdict and appellate review: (1) "the culpability of the defendant's conduct"; (2) "the desirability of discouraging others from similar conduct"; (3) "the impact on the parties"; and (4) "the impact upon innocent third parties." *Id.* Defendants are permitted in such hearings to submit additional evidence bearing on the appropriateness of the punitive award, including evidence of their financial circumstances (which is excluded during the jury trial).

Hammond thus provides detailed substantive standards by which trial courts determine whether punitive damage awards are excessive. The post-verdict procedures give defendants ample opportunity to challenge the propriety of such awards. The trial court's statement of reasons provides an articulated, reasoned basis for the award, and permits meaningful appellate review.

3. *Review By The Alabama Supreme Court.* Review by the Alabama Supreme Court provides a substantial *additional* check on the jury's discretion. Pacific Mutual dismisses Alabama's appellate review of punitive awards on the ground that "extraordinary deference is given to the jury's decision," which "will *only be disturbed* if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of *bias, passion, prejudice, corruption or other improper motive.*" Pet. Br. at 44 (emphasis added). That assertion, however, is demonstrably outdated.[51]

Beginning with *Hammond* in 1986, the Alabama Supreme Court has established *additional* tests for reviewing allegedly excessive punitive awards. First, the state supreme court undertakes a comparative analysis to ensure a particular punitive award is within the range of awards

[51] The arguments of several *amici* are similarly premised on this incorrect assertion.

given under similar circumstances.[52] Second, that court itself applies the detailed substantive standards it has developed for evaluating punitive awards.[53]

[52] *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d at 1053 (reducing punitive award that had been upheld by trial court from $3.5 million to $500,000 after Supreme Court itself applied *Hammond* factors and made a comparative analysis). In *Land & Associates, Inc. v. Simmons*, 1989 Ala. Lexis No. 1048, at 28 (Ala. 1989), largely on the basis of a "comparative analysis with other awards in similar cases," the trial court ordered the plaintiff to remit $1.9 million of a $2.5 million punitive award, and the Alabama Supreme Court affirmed. Pacific Mutual argues that Alabama's punitive damages scheme is "arbitrary" by comparing the *jury's award* in *Land & Associates* with a smaller award in a similar case, without noting that precisely *because of* Alabama's new review standards and procedures, in *Land & Associates* the trial court reduced that jury award by more than 75%. Pet. Br. at 21.

[53] *Central Alabama Electric Co-op v. Tapley*, 546 So. 2d 371, 377-378 (Ala. 1989) (emphasis added). The availability of meaningful trial and appellate review under the *Hammond* standards and Alabama's comparability review sharply distinguishes Alabama's punitive damages system from the Mississippi and Vermont schemes about which some Justices expressed concern in *Bankers Life* and *Browning-Ferris*. Jury discretion is much more limited in Alabama than it was in Mississippi or Vermont. The Mississippi scheme at issue in *Bankers Life*, described by Justice O'Connor as involving "wholly standardless discretion," *Bankers Life and Cas. Co. v. Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring), entirely abdicated judicial review of jury awards. "Mississippi law gives juries discretion to award *any* amount of punitive damages," Justice O'Connor observed, and "[a]s the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed *solely* to the authority and discretion of the jury.'" *Bankers Life*, 108 S. Ct. at 1655, 1656 (emphasis added). Under the review standard used by Mississippi courts, an award would not be considered excessive unless "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." *Bankers Life and Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985) (citing earlier cases). As noted, that test is only the beginning of the inquiry in Alabama. Similarly, the Vermont scheme at issue in *Browning-Ferris*, described by Justice Brennan as "little more than an admonition [to the jury] to do what they think best,"

In particular, the Alabama Supreme Court reviews punitive awards to ensure they do "not exceed an amount that will accomplish society's goals of punishment and deterrence." [54]

Prior to its ruling in this case, that court had further elaborated the specific *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of retribution and deterrence:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> (2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this

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109 S. Ct. at 2923 (Brennan, J., concurring), provided far less structure than Alabama's system. The only instruction given to Vermont juries was that "[i]n determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." *Id.* Under the review standard used by Vermont courts, an award would be set aside or modified only if it was "manifestly and grossly excessive." *Pezzano v. Bonneau*, 133 Vt. 88, 329 A.2d 659, 661 (Vt. 1974). Thus, even if the systems at issue in *Bankers Life* and *Browning-Ferris* would not have met due process requirements, *Alabama's* system does.

[54] *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989) (citations omitted); *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 73 (Ala. 1989). This is a rational and meaningful test. Indeed, it has been proposed by several of petitioner's supporting *amici* as the appropriate due process test for limiting jury discretion. *E.g.*, Brief *Amicus Curiae* of The Alliance of American Insurers, et al. (hereafter "Alliance Amicus Br."), at 6-7, 14, 15, 18 (awards that are rationally related to society's goals can satisfy due process even without legislative cap or legislative standards).

> conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
>
> (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
>
> (4) The financial position of the defendant would be relevant.
>
> (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Green Oil, 539 So. 2d at 223-224; *Central Alabama*, 546 So. 2d at 371.

Application of these standards by the Alabama Supreme Court imposes a meaningful constraint on the discretion of juries awarding punitive damages.[55] Each of

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[55] Applying the *Hammond* factors, trial and appellate courts have ordered reductions in awards or new trials even when those awards did not result from bias. For example, in *Green Oil*, after being ordered to conduct a *Hammond* review by the Alabama Supreme Court, the trial court reduced by almost 85% a punitive award *it had previously upheld as appropriate*. *Green Oil*, 539 So. 2d at 219. In *Wilson*, the Alabama Supreme Court reversed the trial court's approval of a punitive award and itself set aside the entire punitive award of a "properly functioning jury", because "under the facts of this case," punitive damages "would do nothing

these standards is directly and rationally related to determining whether a particular award is greater than is reasonably necessary to punish and deter. Indeed, each has been urged as an appropriate standard by one or more of Pacific Mutual's supporting *amici*. In fact, Alabama's standards are at least as specific as those proposed by so-called "tort reform" advocates, or adopted legislatively by a few States.[56]

Post-verdict application of these standards to an award set pursuant to a traditional common law jury charge satisfies Due Process. This Court's capital punishment decisions make clear that appellate application of substantive standards for punishment satisfies even the greater demands of the Eighth Amendment. Both *Walton v. Arizona*, 1990 U.S. Lexis No. 3462 (1990) and *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), expressly hold that where a jury has received an unconstitutionally vague charge, a state supreme court may constitutionally apply substantive standards and on that basis ratify or set aside the jury's otherwise flawed verdict. In *Clemons*, this Court concluded that such appellate review is not "at odds with contemporary standards of fairness or . . . inherently unreliable and likely to result in arbitrary" verdicts. *Id.* at 1493. It follows *a fortiori* that Due Process is satisfied by trial and appellate court application of constitutionally sufficient standards in civil cases, where life is not at stake.

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to further society's goals of punishment and deterrence." 547 So. 2d at 74. The court applied two of the *Hammond* factors, noting that at the post-verdict *Hammond* hearing the defendants introduced "evidence" of their poverty, and noting that there had been "other civil actions" against the same defendants for the same conduct. *Id.*

[56] *See, e.g.*, Federation of Insurance Counsel Reform Proposal, *reprinted in* J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 21.02, at 12 (1985) (amount of previous award in civil cases for same course of conduct); Ohio Rev. Code Ann. § 2307.80(B) (1988) (likelihood of serious harm; defendant's awareness; profitability; financial condition of defendant; concealment; other awards and criminal penalties); Montana Code § 27-1-221 (same).

In sum, Alabama's procedures for assessing punitive damages provide all the process that is due.[57] The jury's assessment must be based on the evidence, and is set at an amount reasonably calculated to achieve the State's goals of retribution and deterrence. The jury's judgment is then subjected to exacting substantive scrutiny to ensure that the award is not excessive in relation to the State's objectives. The trial and appellate courts carefully and rigorously apply the substantive standards articulated in *Hammond* and *Green Oil* and conduct a comparative analysis of other cases to ensure the verdict falls within a reasonable range.[58]

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[57] *See Mathews v. Eldridge*, 424 U.S. 319 (1976). This Court has not uniformly applied *Mathews* to evaluate procedural due process challenges to traditional state civil adjudicatory rules and procedures. *E.g., Burnham v. Superior Court, supra.* If applicable, *Mathews* in any event mandates a finding that Alabama's procedures provide due process. The State has a strong interest in preserving flexible decisionmaking. *See* pages 26-28 *supra*. The additional procedures demanded by Pacific Mutual would not measurably increase the accuracy of Alabama's approach. Unlike a specific judgment whether a conduct rule has been violated, there is no precise number that represents a correct punitive award. Rather, such awards can fall at different points within a range and remain reasonable. Alabama's post-trial and appellate review ensure punitive awards fall within a reasonable range.

[58] Post-verdict *Hammond* review by the trial courts and the Alabama Supreme Court has often resulted in remittitur of punitive awards. *See Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1051 (Ala. 1987); *Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509, 514 (Ala. 1986); *Davison v. Mobile Infirmary*, 518 So. 2d 675, 682 (Ala. 1986); *Consolidated Freightways Inc., v. Pacheco-Rivera*, 524 So. 2d 346, 353 (Ala. 1988); *Harmon v. Motors Ins. Co.*, 525 So. 2d 411 (Ala. 1987); *North Carolina Mut. Life Ins. Co. v. Holley*, 533 So. 2d 497, 507 (Ala. 1987); *State Farm Mut. Auto Ins. Co. v. Robbins*, 541 So. 2d 477, 478 (Ala. 1989); *United Services Auto Ass'n v. Wade*, 544 So. 2d 906, 917 (Ala. 1989); *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 74 (Ala. 1989); *Williams v. Ralph Collins Ford-Chrysler, Inc.*, 551 So. 2d 964, 966 (Ala. 1989); *cf. State Farm Fire & Cas. Ins. Co. v. Lynn*, 516 So. 2d 1373, 1377 (Ala. 1987)

4. *Pacific Mutual Was Not Denied Due Process.* Pacific Mutual had the benefit of the full panoply of Alabama's procedural protections. The jury was instructed that the amount of any punitive award should be based on the evidence and should be necessary to achieve the goals of retribution and deterrence. The trial court conducted a post-verdict hearing in conformity with the dictates of *Hammond*. Although Pacific Mutual was free to submit evidence at the hearing—including evidence of the financial impact of the jury's punitive award—it chose not to do so. The trial court's statement of reasons made clear that the substantive criteria set forth in *Hammond* were applied. Pet. App. A 14. In particular, the trial court found the conduct at issue to be "malicious, gross and oppressive." *Id.* The trial court also found the punitive award reasonable in light of the importance of encouraging insurance companies to prevent similar conduct by their employees in the future. Pet. App. A 15. And the trial court found the four separate awards were "in proportion to the damage done each plaintiff," *id.*; the only substantial award was rendered in the case of respondent Haslip, who was the most seriously harmed.[59]

Pacific Mutual also received the benefit of review by the Alabama Supreme Court. That court specifically approved the verdict under the *Hammond* standards, and cited with approval the reasoning of the trial court, which examined the relation of the punitive award to the harm caused, the degree of reprehensibility, and the need to deter such conduct in the future. Pet. App. B 13; *see id.* at A 14-15. Although the Alabama Supreme Court

(remittitur of compensatory damage award); *Auburn Ford, Lincoln Mercury, Inc. v. Norred*, 541 So. 2d 1077, 1080 (Ala. 1989) (same).

[59] As noted at page 43 *infra*, the general verdict, rendered in this case without objection from Pacific Mutual, does not reveal what *if any* portion of any of the awards is punitive.

did not explicitly cite *Green Oil* and *Central Alabama*, those decisions had been rendered only months before the decision in this case, and the court would not have affirmed this award if it were inconsistent with the additional standards set forth in those decisions. *See Walton v. Arizona*, 1990 U.S. Lexis No. 3462, at 3 ("judges are presumed to know the law and apply it in making their decisions"). In any event, the Alabama Supreme Court brought to bear all relevant factors recited in *Green Oil*: of the new factors mentioned in *Green Oil*, Pacific Mutual understandably chose not to make its financial position an issue; no criminal sanctions had been imposed for this conduct; nor had any prior punitive awards been imposed. Accordingly, the *Green Oil* refinements of the *Hammond* standards were either applied in this case or on the facts did not even arguably support Pacific Mutual's claim of excessiveness.[60]

Application of constitutionally sufficient criteria by the Alabama courts conclusively disposes of Pacific Mutual's

[60] The first four *Green Oil* factors are merely more elaborate statements of the factors set forth in *Hammond* itself (the culpability of the defendant, the desirability of discouraging others from similar conduct, the impact on the parties, and the impact on innocent third parties). 493 So. 2d at 1379. The Alabama Supreme Court's citation of *Hammond* proves these factors were applied. Pacific Mutual has never argued that this award is excessive under the fourth, fifth, sixth or seventh *Green Oil* factors. Thus, the only factors relevant to the facts of this case are culpability and deterrence, both of which were specified in *Hammond*. It would have been ludicrous for Pacific Mutual to argue that this award was economically destructive. The *total* award is less than two tenths of one percent of Pacific Mutual's net cash from operations ($645,595,821) for 1986, the year prior to trial, and less than two one-hundreths of one percent of Pacific Mutual's total assets $6,981,385,797) on December 31, 1986. Annual Statement of Pacific Mutual Life Insurance Company to the Insurance Department of the District of Columbia for the Year Ended December 31, 1987, Life Accident and Health, at 2, 4a (reporting both 1986 and 1987 figures).

claims. This Court's recent Eighth Amendment decisions make clear that "if a State has adopted a constitutionally narrow construction of a facially vague [standard], and if the State has applied that construction to the facts of the particular case," then the Constitution is fully satisfied, even if this Court would apply the standards differently. *Lewis v. Jeffers*, 1990 U.S. Lexis No. 3463 (1990) (slip op. at 14). This Court does not examine whether the standards have been correctly applied in the particular case, because that is a question of the proper application of state law. *Id.* This reasoning applies fully in the present context. Alabama has articulated a narrowed construction of its standards for assessing punitive damages, and has applied those standards in this case. Accordingly, Pacific Mutual's due process challenge must be rejected.

C. Pacific Mutual's Vagueness Challenge Ignores The Crucial Constitutional Distinction Between Rules Governing Conduct And Standards For Deciding What Consequences Should Flow From Violations Of Those Rules.

Pacific Mutual's "void-for-vagueness" argument is also meritless. As demonstrated, Alabama's jury instructions, post-verdict review and appellate scrutiny each independently provide well-defined substantive standards for guiding and constraining the assessment of punitive damages. These standards provide far more than the "minimal guidelines" the "void-for-vagueness" doctrine requires. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Even assuming *arguendo* the void-for-vagueness doctrine applies to common law civil adjudication between private parties,[61] the decisions on which Pacific Mutual

[61] Decisions by this Court applying the doctrine typically involve statutes or regulations enforced *by government* against private citizens. *See, e.g., Kolender*, 461 U.S. at 357 ("void-for-vagueness doctrine requires that a *penal* statute define the *criminal* offense with sufficient definiteness" (emphasis added)). The concerns that

relies are inapposite because they involved laws regulating constitutionally protected activity. *See, e.g., Kolender*, 461 U.S. at 358 ("First Amendment liberties" and "constitutional right to freedom of movement"); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (First Amendment rights).[62] When constitutionally protected activity is implicated, statutes must be sufficiently clear to ensure that protected activity is not chilled. When—as here—state laws merely regulate economic activity and pose no risk of chilling protected activity, "a less strict vagueness test" applies. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Alabama's punitive damages law easily meets the test for economic regulations.

Moreover, Pacific Mutual's argument ignores a crucial distinction between laws regulating conduct and standards governing the consequences that flow from violation of those laws. The Due Process Clause requires that "a penal statute define the criminal *offense* with sufficient definiteness that ordinary people can understand what *conduct* is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357 (emphasis added). Every decision by this Court applying the void-for-vagueness doctrine has involved a law purporting to proscribe particular *conduct*.

Pacific Mutual cannot claim that Alabama's prohibition of intentional fraud is ambiguous or uncertain in

make the doctrine appropriate in that context are greatly diminished in cases between private litigants. The risk of arbitrary and discriminatory *enforcement* of the law by police and prosecutors simply is not present. *Cf. Browning-Ferris*, 109 S. Ct. 2909 (1989).

[62] Because of the different purpose of, and interests protected by, the First Amendment, any damages designed to *deter* future speech might violate that Amendment, but the issue is not raised here.

any way. Pacific Mutual argues, however, that it was entitled to advance notice of the precise punitive consequences that would be imposed upon it for intentional fraud. This interest is not protected by the "void-for-vagueness" doctrine. Citizens do not need to know what consequences will follow from violating a law in order to conform their behavior to that law. They need only know what "*conduct* is prohibited." *Kolender*, 461 U.S. at 357 (emphasis added). Advance knowledge of what consequences will result from deliberate violations could be relevant only to calculating the costs and benefits of intentionally breaking the law. This "interest" is hardly one of constitutional magnitude.

Nor is the constitutional concern about discriminatory *enforcement* implicated. As this Court has repeatedly made clear, vague conduct rules deny due process primarily because they "entrust lawmaking to the moment-to-moment judgment of the policeman on his beat," *Smith v. Goguen*, 415 U.S. 566, 575 (1975) (quotation deleted), and "confer[] on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring in the judgment). This risk of governmental overreaching is not present here because the litigation involves private parties, and the proscription of fraud was clear and left no lawmaking authority to the jury or the reviewing court.

This Court's decision in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), is not to the contrary. Like every other void-for-vagueness case, *Giaccio* struck down a law governing *conduct*. The Pennsylvania law at issue—which permitted juries in criminal cases to assess court costs against *acquitted* defendants who had engaged in "reprehensible" conduct—left "jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 402-403. The case did not involve jury discretion to fix the *amount* of costs.

The challenge was directed at the vagueness of the standard of conduct subjecting defendants to *any* liability.

Standards for determining the *consequences* of violating the law have never been subjected to "void-for-vagueness" analysis. To the contrary, this Court has recognized that States are generally "free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Many state criminal statutes thus permit a sentence of "any term of years" for certain crimes.[63] Decisions about appropriate consequences are "significantly different" than decisions whether a violation has occurred. In assessing consequences to be imposed, the decisionmaker "does not attempt to decide whether particular elements have been proved," but instead weighs "countless facts and circumstances" that cannot be prescribed in advance. *See Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment). States have a substantial interest in preserving the flexibility essential to these "difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'" *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted). For this reason, courts have consistently rejected due process challenges even to criminal sentencing schemes that vest broad discretion in the decisionmaker to fix an appropriate sentence.[64]

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[63] *E.g.*, Mich. Code § 750.317; Va. Code § 18.2-58; D.C. Code § 22-2801; *see also* Texas Crim. Code § 12.32 (Term of 5 to 99 years for any first degree felony). *See Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (affirming 200 year sentence under statute permitting sentence of any term of years).

[64] *See, e.g., United States v. Wivell*, 893 F.2d 156, 160 (8th Cir. 1990) ("It is well-established that, with the exception of capital cases, there is no constitutional right to [sentencing guidelines]. Indeed, a defendant's due process rights are unimpaired by the complete absence of such guidelines"); *United States v. Davis*, 801 F.2d 754, 756-757 (5th Cir. 1986); *R.G. Britton v. Rogers*,

III. THE SIZE OF THIS AWARD DOES NOT VIOLATE ANY *SUBSTANTIVE* REQUIREMENT OF DUE PROCESS BECAUSE IT IS RATIONALLY RELATED TO ALABAMA'S GOALS OF DETERRENCE AND RETRIBUTION, AND THUS CANNOT BE FOUND "WHOLLY ARBITRARY AND UNREASONABLE."

Pacific Mutual and supporting *amici* also raise a *substantive* due process challenge to the "amount" of this award.[65] Pacific Mutual does not describe the nature of the applicable test, but its supporting *amici* candidly acknowledge that "[a]s in other areas of substantive due process, the governing constitutional standard is one of rationality." They further concede: "So long as an award of punitive damages is 'no more' than is 'reasonably calculated' to serve the purposes of deterrence and punishment, it will pass muster under the Due Process Clause."[66] Under that standard, the awards in this case were plainly constitutional.

The argument that these awards are grossly excessive begins with the erroneous factual premise that the total punitive component of these awards exceeds $1 million.[67]

631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977); *Smith v. Follette*, 445 F.2d 955, 960-961 (2d Cir. 1971); *United States v. Baker*, 429 F.2d 1344, 1346-1347 (7th Cir. 1970); *Sero v. Oswald*, 351 F. Supp. 522, 530 (S.D.N.Y. 1972); *Rogers v. State*, 265 Ark. 945, 582 S.W.2d 7, 13-14 (Ark. 1979) (*en banc*).

[65] Pet. Br. at 32-35. Pacific Mutual is understandably reluctant to characterize this as a substantive due process challenge, but the briefs of supporting *amici* candidly acknowledge that it is. *E.g.*, Alliance Amicus Br. at 5-24; Brief *Amicus Curiae* for The Business Roundtable, *et al.* (hereafter "Business Roundtable Amicus Br.") at 2-10.

[66] Business Roundtable Amicus Br. at 8, 9; *See also* Alliance Amicus Br. at 6-7, 11-12, 14, 15, and 17-19.

[67] *E.g.*, Alliance Amicus Br. at 24 (assuming punitive component is over $1 million).

Because Pacific Mutual did not request special verdicts, as it had a right to do, *American Pioneer Life Ins. Co. v. Sandlin*, 470 So. 2d 657, 668-69 (Ala. 1985), the jury gave only general verdicts for each of the four respondents. In these circumstances, Alabama law presumes that the compensatory portion is "as much as could possibly be allowed for compensation," and the defendant bears the burden of showing how much of each general verdict is punitive; Alabama courts then review the "remaining portion" to determine whether the punitive components would "exceed an amount necessary to accomplish society's goal of adequately punishing and deterring."[68]

In closing argument, counsel for respondents requested $10,000 as compensatory damages for respondent Hargrove, who received a total award of $10,288. RT at 815, 920. Accordingly, Hargrove's punitive award was, at most, $10,288. A similar analysis applies for respondents Craig and Calhoun, who each requested $10,000 in compensatory damages and received, respectively, total awards of $12,400 and $15,290. RT 814, 920-921. These were separate general verdicts and their constitutionality must be evaluated separately. It is impossible to argue that the punitive components of the awards to respondents Hargrove, Craig and Calhoun are constitutionally excessive, and Pacific Mutual has not seriously tried.

Respondent Haslip requested compensatory damages of $200,000 and received a total award of $1,040,000. RT 812, 921-922.[69] Applying Alabama law, the punitive component of Mrs. Haslip's award was, *at most*, $840,000 (which is just over four times the compensatory component). That amount is well within any conceivable

[68] *McDowell v. Key*, 557 So. 2d 1243, 1249 (Ala. 1990).

[69] Pacific Mutual effectively concedes that the jury awarded at least $200,000 in compensatory damages to respondent Haslip. Pet. Br. at 32, 35.

substantive limits of the Due Process Clause, as we will now show.

Neither this nor any other court has *ever* found a punitive damage award excessive as a matter of substantive due process. Indeed, Pacific Mutual and its supporting *amici* have been able to find only two cases, both from the heyday of economic substantive due process, in which this Court found *other* types of awards excessive.[70] Neither involved a punitive damage award, and neither remotely suggests that the award at issue here is excessive.[71] In all of the other cases cited by Pacific Mutual and its supporting *amici*, the Court *upheld* the amount at issue.[72]

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[70] *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340 (1913); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

[71] Both involved statutory civil fines imposed on common carriers. *Tucker* held that a $500 fine violated due process because it threatened to "intimidate" common carriers from "resorting to courts to test the validity" of statutory maximum rates; the only way to challenge the rate ceiling was to charge an excessive rate and face the consequences. 230 U.S. at 347, 349-350. *Southwestern Tel.* held that a $100-per-day fine violated due process because it was imposed despite a complete absence of notice that the conduct giving rise to the fine was unlawful. 238 U.S. at 489. A case less far afield, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), is not even cited by Pacific Mutual. There, the Court upheld a rate violation penalty against a common carrier who *did* have an opportunity to challenge the underlying rate. The penalty was 113 times the plaintiff's actual loss. The Court rejected the argument that the penalty had to be "confined or proportioned to . . . loss for damages," *id.* at 66, and upheld the penalty because it was not "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." 251 U.S. at 67. As this ruling makes clear, it is neither necessary nor appropriate to require a fixed ratio between compensatory and punitive damages. In cases where the harm to an individual plaintiff is slight, but there exists a risk that the defendant will inflict that harm upon a wide number of others, effective deterrence will require a punitive award substantially in excess of compensatory damages.

[72] *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909) (upholding $1.6 million "penalty" *and* cancellation of company's license to do business); *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885) (upholding double damages penalty noting—apparently as proof of rationality of the penalty—that double, treble "and even quadruple the actual damages" were available in other States); *Minneapolis & St. Louis Ry Co. v. Beckwith*, 129 U.S. 26 (1889) (same).

Confronted with these authorities, Pacific Mutual understandably urges adoption of the more rigorous review standards announced in *Solem v. Helm*, 463 U.S. 277 (1983), for judging sentences of life without parole under the Cruel and Unusual Punishments Clause. There is no warrant for doing so. Heightened substantive scrutiny of punitive damage awards is no more authorized under the Due Process Clause than it is under the Excessive Fines Clause. *Browning-Ferris*, 109 S. Ct. at 2914.[73]

In a further effort to obtain heightened due process scrutiny, Pacific Mutual argues that whether a punitive damage award is constitutionally excessive should be judged by comparison to analogous *criminal fines*. Pet. Br. at 34-35. No court has so held. Furthermore, there are many reasons why Alabama could rationally decide to authorize punitive awards that are larger than criminal fines. First, the fine is only one component of the criminal punishment, and usually the least significant. As Justice O'Connor noted in *Browning-Ferris*, when discussing the Eighth Amendment, any comparison between punitive awards and criminal fines would have to "consider not only the possible monetary sanctions, but also any possible prison term." 109 S. Ct. at 2934 (O'Connor, J., concurring in part and dissenting in part). Second, in many States, including Alabama, an insurance company convicted of criminal conduct can lose its license to do business.[74] The comparison should therefore include the value

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[73] Indeed, *Solem* repeatedly cautioned that the absence of *any* parole was critical to its ruling. 463 U.S. at 300-303, and nn. 31, 32.

[74] Ala. Ins. Code §§ 27-3-21(a); 27-3-21(b)(1) (Michie ed. 1989 Supp.).

to the company of its continued right to do business.[75] Third, the punitive damages system is intended to *supplement* the criminal law system, not to copy it. Criminal fines are set with full knowledge that punitive damages exist as a parallel enforcement system. Legislators could rationally decide to allow juries, and trial and appellate courts to assess punitive awards larger than criminal fines if warranted by the facts and circumstances of particular cases.

Finally, Pacific Mutual has not shown good cause for this Court to intrude further on state sovereignty by applying a *heightened* standard of substantive due process review to public welfare and economic regulation by the States. Because every application of substantive due process is a limitation on state power, the test for its application has always shown maximum deference to state sovereignty. Certainly Alabama could rationally decide, as it has, that punitive awards totalling at most, $847,978 do not exceed an amount reasonably necessary to punish and deter the fraudulent conduct proved here. That should end any conceivable substantive due process inquiry.

IV. PETITIONER'S OTHER ARGUMENTS LACK MERIT.

A. Due Process Does Not Require The Full Panoply of Protections Available To Criminal Defendants In A Civil Punitive Damages Proceeding.

This Court's decision last term in *Browning-Ferris*—that punitive damages are not sufficiently criminal in nature to require application of the Excessive Fines Clause—refutes Pacific Mutual's theory that civil punitive damage proceedings require the constitutional protections applicable in criminal proceedings. Lower courts have uniformly rejected similar contentions.[76]

Pacific Mutual nonetheless argues that punitive damage proceedings require proof beyond a reasonable doubt, a predetermined cap on the amount of damages, and bifurcation of the liability and penalty portions of the proceeding. These contentions have no merit.[77]

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[75] "In identifying the relevant civil penalties [under the *Eighth* Amendment], the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions." *Browning-Ferris*, 109 S. Ct. at 2934 (O'Connor, J., concurring in part and dissenting in part).

[76] *Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1397 (D.N.J. 1990); *Ah You Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Hawaii 1989); *McCutchen v. Liberty Mutual Ins. Co.*, 699 F. Supp. 701 (N.D. Ind. 1988); *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971 (D.N.J. 1984); *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015 (Ariz. App. 1989); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199 (Kan. 1986); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337 (1985); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981); *see also Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Peterson v. Superior Court*, 31 Cal. 3d 147, 181 Cal. Rptr. 784 (Cal. 1982); *People v. Superior Court*, 12 Cal. 3d 421, 115 Cal. Rptr. 812 (Cal. 1974); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); *Gibson v. Gibson*, 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (Cal. 1967).

[77] Pacific Mutual's *Ex Post Facto* argument likewise has no merit. First, the very essence of an *ex post facto* challenge is that there must be some *change* in the law that punishes conduct that was previously considered innocent. *Weaver v. Graham*, 450 U.S. 24, 31 (1981); *Collins v. Youngblood*, 58 U.S.L.W. 4855, 4856 (1990). Alabama has imposed vicarious punitive liability for years. *See* note 30 *supra*. Similarly the alleged unpredictability of punitive awards raises concerns appropriately analyzed under the Due Process Clause, and, as demonstrated, Pacific Mutual was not denied due process.

Second, a civil case—even one imposing a civil penalty by the government—does not implicate *ex post facto* prohibitions unless the law is "so punitive" as to be criminal "either in purpose or

First, Pacific Mutual was not entitled to a "beyond a reasonable doubt" standard of proof, because the full panoply of protections available to criminal defendants simply are not required in a civil proceeding between private litigants. The criminal standard of proof is not constitutionally required where the government is not a party and the stigma of a criminal prosecution is absent. In any event, the criminal standard of proof was met in this case. The Alabama Supreme Court found that another instruction, not at issue here, was erroneous, but the error was harmless because the evidence of intentional fraud was "inescapable." Pet. App. B 6 (quoting Tr. Ct. finding, *id.* at A 14).[78]

Second, Pacific Mutual plainly is not entitled to bifurcation. Pacific Mutual waived any such right under Alabama law by failing to request bifurcation at trial.[79] Accordingly, this Court should not reach that issue.[80] Moreover, the only arguable justification for bifurcation—that the liability jury not be exposed to evidence of the defendant's wealth—is not at issue in this case

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effect." *United States v. Ward*, 448 U.S. 242, 248-49 (1980). This Court's decision last term in *Browning-Ferris* precludes the argument that the imposition of punitive damages is criminal in nature.

[78] Pacific Mutual did not request a "clear and convincing" standard of proof, either below or here. Therefore, this Court should not reach that question. *Bankers Life*, 108 S. Ct. at 1649; *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). In any event, this Court has required a heightened standard of proof in civil proceedings—as a matter of due process—only where substantial personal liberty or privacy interests are at stake. *See, e.g., Santosky v. Kramer*, 455 U.S. at 764-65 (parental rights termination proceeding). And even if such a standard were required, the trial court's ruling makes clear it was met.

[79] *Central Alabama*, 546 So. 2d at 375 (refusing to review due process argument raised on appeal that punitive damage trials must be bifurcated because appellant "made no motion to bifurcate the trial").

[80] *See* note 78 *supra*.

because Alabama does not permit evidence of wealth to reach the jury.

Third, Pacific Mutual has cited no authority for its claim that procedural due process requires a predetermined cap on the amount of punitive damages that may be awarded. The Court has rejected that claim before. *See Standard Oil Co. v. Missouri*, *supra*. Furthermore, Pacific Mutual cannot belatedly assert this claim, which was not raised below or in its petition for certiorari. *Browning-Ferris*, 109 S.Ct. at 2921.

B. Pacific Mutual's Equal Protection Claim Has No Merit.

Pacific Mutual has substituted for its initial equal protection claim a new and different claim. *Compare* Cert. Pet. at 26-26 *with* Pet. Br. at 40-41. Its initial equal protection theory, therefore, has been abandoned because of Pacific Mutual's failure to brief the claim. Because certiorari was not granted on the substituted claim, neither equal protection claim is properly before this Court. *Browning-Ferris*, 109 S. Ct. at 2921.

In any event, the Equal Protection Clause is not violated when separate juries arrive at different punitive damage awards for different defendants based on different factual situations. Absent exact identity in two different cases, there is no merit to the argument that differing verdicts lack a rational basis—which is all that Equal Protection requires in this context. Moreover, Pacific Mutual has failed to point to any other *particular* jury verdict, based on similar facts, that renders this punitive damage award a violation of equal protection.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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